SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 492

CLARENCE BRANDENBURG,

Appellant,

—v.—

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I.

Failure of Counsel for Defendant to Object to Instructions to the Jury Is Irrelevant to Constitutional Objections to the Act.

Appellee contends that because counsel for defendant raised no objections to the instructions of the trial court to the jury, appellant is barred from claiming error in the interpretation of the statutes involved.

Appellee misunderstands appellant's argument. Appellant relies on the instructions given the jury only as further evidence of an authoritative interpretation of the Act

and as further evidence that the Act is unconstitutional. But these constitutional matters had already been raised and rebuffed by the trial court earlier in the proceedings.[1] In keeping with these earlier rulings, the instructions defined advocacy in the Act as follows: "To advocate means to speak in favor of, defend by argument, to support, vindicate, or recommend publicly" (A. 77-78). As pointed out in appellant's principal brief, this charge was necessarily adopted as the proper interpretation of the Act when the Ohio appellate courts affirmed appellant's conviction.

Appellant has consistently maintained, at trial and on appeal, that the Ohio Act is unconstitutional on its face and as applied. The instructions interpreting the Act reflect its constitutional infirmities and an objection to instructions on the same grounds as the Act itself would have been redundant and must be considered unnecessary in light of the trial court's refusal to entertain such objections earlier in the proceedings.

Even the Ohio case cited by appellee in support of its contention does not lead to appellee's conclusion. A careful reading of *State* v. *Cickelli,* 118 O.A. 87, 24 O.O. 2d 420, 92 O.L.A. 338, 193 N.E. 2d 409, shows that the Ohio Supreme Court in that case did carefully examine the charge, despite the absence of objections. Because there were felt to be no errors of consequence in the charge, the court rejected the appeal on that ground. In the present case infirmities of a grave nature are alleged—that the Act violates the First and Fourteenth Amendments to the Federal Constitution. The vague and overbroad definition of the term "advocate" as well as the unqualified use of

[1] See R. 3, 4.

the term "assembly" invalidate the Act. See *Yates* v. *United States,* 354 U.S. 298 (1957), *Noto* v. *United States,* 367 U.S. 290 (1963). Such grave constitutional errors cannot of course be waived in the manner alleged by appellee.

II.

Advocacy Forbidden by the Ohio Criminal Syndicalism Act Includes Constitutionally Protected Speech.

Appellee and *amicus curiae* contend that advocacy in the context of the Ohio Act excludes advocacy of abstract doctrine and that therefore the Act is neither vague nor overbroad. For the most part they content themselves with mere assertions of this position.

One of the few arguments on which they rest their contention that advocacy is to be read as limited to activities that may constitutionally be prohibited demonstrates their misunderstanding of the constitutional distinction between abstract advocacy and advocacy in the nature of incitement. See *Yates* v. *United States, supra.* They claim that the Act does not proscribe advocacy of abstract doctrine, but rather advocacy of such activities as crime and violence. But the proper constitutional inquiry does not focus on the subject matter being advocated. The crucial question is the nature of the advocacy itself. Any doctrine, no matter how pernicious or distasteful, may be advocated so long as the advocacy is not directed at unlawfully inciting the unlawful activity.[2] Thus, merely setting out the

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[2] As this Court has made clear, the advocacy of illegal conduct has long been recognized as constitutionally protected. In *Kingsley Picture Corp.* v. *Regents,* 360 U.S. 684, 689 (1959) this Court reiterated:

(continued on next page)

subjects, the advocacy of which are prohibited by Ohio, ignores the constitutional issue and fails to meet appellant's objections.

Appellee and *amicus curiae* rely on *Yates* v. *United States, supra,* as supporting the constitutionality of the Ohio Act. But in *Yates* this Court upheld the constitutionality of the Smith Act only after severely limiting the type of advocacy that was prohibited. Ohio has not similarly limited the operative terms of her Act, and this Court may not perform that task since state and not federal legislation is involved.

Appellee contends that *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967) is irrelevant to this case. However, in *Keyishian* this Court considered statutory language that, in relevant aspects, was practically identical to the Ohio Act. In *Keyishian* it was clear that New York was attempting to prohibit or control speech, assembly, and other First Amendment activities. This Court found the statutory language to be vague and overbroad and therefore in violation of the First and Fourteenth Amendments. The similar phraseology in the Ohio Act suffers from the same constitutional infirmities.

"Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' *Whitney* v. *California,* 274 U.S. 357, at 376 (concurring opinion). 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.'"

CONCLUSION

For all the reasons stated above as well as for the reasons discussed in appellant's prior briefs in this Court, appellant's conviction should be reversed.

Respectfully submitted,

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